(3)

File date June 26, 2006

No. 06-13

In The Supreme Court of the United States

WENDELL PIKE,

Petitioner,

v.

GOVERNMENT EMPLOYEES INSURANCE COMPANY,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals from the Sixth Circuit

SUPPLEMENTAL APPENDIX

JASON B. BELL
ERIC A. HAMILTON
KERRICK, STIVERS & COYLE, PLC
2819 RING ROAD
SUITE 200
ELIZABETHTOWN, KY 42701
(270) 737-9088
Counsel for Petitioner

No. 3:04CB-131-S
UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

WENDELL PIKE — Plaintiff

v.

GOVERNMENT EMPLOYEES INS. CO., — Defendant

MEMORANDUM OPINION

This matter is before the court on motion of the defendant, Government Employees Insurance Companies ("GEICO"), to dismiss the action on the ground that the claim is barred by the limitation of actions provision contained in the automobile insurance policy under which the plaintiff seeks underinsured motorist benefits.

This action was filed in the Hardin County, Kentucky Circuit Court on February 5, 2004, over three years after the date of the automobile accident which underlies the plaintiff's claim in this case. The action was removed to this court by GEICO, a Maryland corporation, under our diversity jurisdiction. GEICO now seeks dismissal.

When a motion to dismiss is made, the court must take the allegations of the complaint as true and grant dismissal only when it is beyond doubt that the plaintiffs can prove no set of facts entitling them to relief. *Conley v. Gibson*, 355 U.S. 41, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957).

On November 21, 2000, Wendell Pike and Tammy Stear were involved in an automobile accident in Louisville, Kentucky. At the time of the collision, Pike was operating a

United States Postal Service truck while working as a mail carrier. Worker's Compensation has paid and is continuing to pay his medical bills for injuries he claims he sustained in the accident.

Stear had liability insurance providing a maximum benefit of $50,000.00. Pike settled his claims against Stear for the policy limit on May 15, 2003. Pike then filed the present action against GEICO, his insurer, for underinsured motorist benefits ("UIM").

Pike's policy with GEICO contained the following provision pertaining to underinsured motorist coverage:

> ACTION AGAINST US:
>
> Suit will not lie against us unless the ***insured*** and his legal representative have fully complied with all the policy terms. Any legal action to recover underinsured motorist benefits must be commenced within the period prescribed by Kentucky law for the filing of a personal injury action arising out of a motor vehicle accident.

GEICO Automobile Policy Amendment, Underinsured Motorist Coverage, Kentucky, Conditions, ¶3.

Under Kentucky law, the period for filing an action to recover UIM benefits is two years from the date of the injury or from the last basic or added reparation payment made by any reparation obligor, whichever last occurs. KRS 304.39-230(6). In this case, no basic or added reparation payments were made. Worker's compensation has paid Pike's medical bills and expenses. Worker's compensation payments are not "basic" or "added reparation payments" contemplated by the statute, *Lawson v. Helton Sanitation, Inc.*, 34 S.W.3d 52, 61 (Ky. 2001). Therefore, the worker's compensation payments did not

toll the running of the statute of limitations on his claims against the tortfeasor. The statute of limitations on any tort liability claim expired two years after the accident. Thus the limitation on his claim for UIM benefits, defined by the policy to be co-extensive with the statutory tort liability period, also expired two years after the accident.[1] As this action was not filed until thirty-eight months after the accident, the claim is barred and the action must be dismissed.

Pike contends that the general, fifteen-year statute of limitations for contract claims, KRS 413.090(2) applies to his claim by virtue of the holding in *Brown v. State Auto*, 189 F. Supp.2d 665 (W.D.Ky. 2001).

In *Brown*, the United States District Court for the Western District of Kentucky looked to the holding of the Kentucky courts in *Webb v. Kentucky Farm Bureau Insurance Co.*, 577 S.W.2d 17 (Ky. App. 1978); *Elkins v. Kentucky Farm Bureau Insurance Co.*, 844 S.W.2d 423 (Ky. App. 1992); and *Gordon v. Kentucky Farm Bureau Insurance Co.*, 914 S.W.2d 331 (Ky. 1995) in an attempt to determine whether a contractual limitation of two years was reasonable and should be enforced in the case before it. The court noted in *Brown*, 189 F.Supp.2d at 670 that "The *Gordon* court did reiterate that an insurer may contract with its insured for a shorter period of time in which to file uninsured benefits claims, so long as the contractual limitations period is reasonable. [*Gordon*, 914 S.W. 2d] at 333." The court then concluded that the policy provision before it which required UIM claims to be brought within two years of the date of the accident was unreasonable. The court held that

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[1] The statute speaks in terms of the time of the "injury". The parties appear to be focus on the time of the accident. There does not appear to be any question, however, that the injury to Pike occurred at the time of the accident. Therefore, this is a distinction without a difference under these facts.

> [T]he argument that the two-year limitation period here is unreasonable has considerable support in *Gordon's* express finding that it would be "illogical to adopt a general rule which would require a plaintiff to sue his own insurer before discovering whether or not the tortfeasor is in fact an uninsured motorist." *Id.* At 332....This Court believes that the fair reading of *Gordon* demonstrates three key points: (1) that the MVRA does not govern contract-based actions seeking underinsured motorist benefits; (2) that any contractual limitations period must be reasonable; and (3) that it is illogical- in other words, unreasonable- to require a plaintiff to sue her own insurer for uninsured motorist benefits before being required to discover whether or not the tortfeasor is in fact an uninsured motorist. This Court believes that the Kentucky Supreme Court would not make an distinction between uninsured motorist and underinsured motorist in this context, and would likewise find it unreasonable to require an insured to sue her insurer for underinsured motorist benefits prior to being required to sue the tortfeasor, and thus to determine whether or not the tortfeasor is in fact underinsured.

Brown, 189 F.Supp.2d at 670-71.

The net result of the holding in *Brown* is that the fifteen-year statute of limitations governs a claim for UIM benefits unless the insurance policy contains a reasonable limitation period prescribing another length of time. The court noted in

Brown that *Gordon* approved reasonable contractual limitation periods.

The GEICO policy in issue here contains a provision which looks to the tort liability limitation in the MVRA. The MVRA prescribes a period of two years which may be extended by the payment of reparation benefits. Thus the time limit in which the claim for UIM benefits must be brought is exactly the same time as that in which suit must be filed against the tortfeasor, no less than two and possibly more than two years from the date of the injury. This period, which dovetails with the tort liability period of limitation, is reasonable inasmuchas it does not require the insured under any circumstance to file suit for UIM benefits prior to the expiration of the limitation period for filing suit against the tortfeasor.

We note for the sake of clarity that our ruling does not contradict the statement in *Brown, supra.*, that "the MVRA does not govern contract-based actions seeking underinsured motorist benefits." The court has not stated that the MVRA statute of limitations applies in this action. Rather, our reasonableness inquiry has led the court to apply a flexible limitations period defined by the contract which is coextensive with the period contained in the MVRA.

For the reasons set forth hereinabove, the motion of the defendant, GEICO, to dismiss will be granted, as the claim is barred by the statute of limitations contained in the policy of insurance. A separate order will be entered this date in accordance with this opinion.

Charles R. Simpson III, Judge
United States District Court

Filed February 24, 2005

No. 3:04CB-131-S
UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

WENDELL PIKE — Plaintiff

v.

GOVERNMENT EMPLOYEES INS. CO., — Defendant

ORDER

Motion having been made and for the reasons set forth in the memorandum opinion entered herein this date and the court being otherwise sufficiently advised, **IT IS HEREBY ORDERED AND ADJUDGED** that the motion of the defendant, Government Employees Insurance Companies, to dismiss is **GRANTED** and this action is **DISMISSED WITH PREJUDICE.**

There being no just reason for delay in its entry, this is a final order.

Charles R. Simpson III, Judge
United States District Court

Filed February 24, 2005

CERTIFICATE OF SERVICE

This is to certify that a true and exact copy of the foregoing was this day faxed, hand-delivered or placed in the U.S. Mail addressed as follows:

William Tinker
Spurgeon & Tinker, PSC
120 Prosperous Place
Suite 202
Lexington, KY 40509
859-263-1860
Counsel for Respondent

Paul Musselwhite
Musslewhite, Meinhart & Staples, PSC
385 W. Lincoln Trail Boulevard
Radcliff, KY 41060
270-351-6032
Co-Counsel for Petitioner

This the 30th day of June, 2006.

J Bill

Counsel for Petitioner